

April 14, 2004

BLANK, County Administrator

Locality

Address

Address

Re: Interim guidance regarding (1) stream and wetland restoration as water-dependent activities; and (2) follow-up pertaining to earlier guidance on vesting and the Bay Act

Dear *Blank*:

The Department has recently received a number of inquiries about how stream and wetland restoration activities should be handled under the Chesapeake Bay Preservation Act. We have also received inquiries asking for further clarification of guidance on vesting addressed in my letter to you of January 8, 2004.

Regarding the first matter, I have discussed this with Department staff as well as with staff in the other regulatory agencies. Based upon these discussions, I am providing interim guidance on this matter. As well, I will bring the matter before the Chesapeake Bay Local Assistance Board during its review of the Bay Act regulations in the fall of 2004.

In the past CBLAD has advised localities that stream and wetland restoration activities should be treated as an exception to the General Performance Criteria and the Development Criteria for RPAs. The most recent regulatory changes now require exceptions to undergo a public hearing process, which has raised concerns among some of our stakeholders. The concern is that these are generally environmentally beneficial projects, which already go through a great amount of

scrutiny by other state and federal permitting agencies and which quite often are subject to a public notice process in association with those permits.

The science and techniques of stream and wetland restoration have advanced considerably over the past decade, whereby there is much greater success with these projects than in the past. Given these factors and the fact that these activities appear to be inherently related to the hydrology of streams and/or the ground water in riparian zones, there is no compelling reason why these activities should continue to be treated as exceptions to the performance criteria, but rather should be regarded as water-dependent activities allowed for under the performance criteria, particularly where these projects undergo review by the DEQ and Corps of Engineers. Such activities should still be required to provide a Water Quality Impact Assessment (WQIA) along with plans submitted for local government administrative approval. The kind of information needed for the WQIA will have already been developed for the submissions to the permitting agencies, so such a requirement should not result in additional work or expense.

However, in the event that there may be cases of similar activities that would not undergo the scrutiny of the other agencies with associated permit performance measures – I expect such cases would be rare – the local authorities should review those activities as exceptions rather than as by-right activities. In other words, only those stream and wetland restoration projects reviewed and approved by the DEQ and/or Corps should be allowed, by right, as a water-dependent activity.

Regarding the vesting guidance, on January 8, 2004, I mailed a letter to you and the other local government executives in Tidewater Virginia providing guidance regarding vested rights determinations as they pertain to implementation of the revisions to your local Chesapeake Bay Act ordinance. Section 10.1-2115 of the Bay Act provides that “. . . this chapter shall not affect vested rights of any landowner under existing law.” I have been informed that my earlier letter has generated some confusion and concern regarding the potential vesting of some pending subdivision projects. The concerns have been raised with reference to § 15.2-2307 of the Code of Virginia, which clarifies the kinds of “significant government actions” that should establish a vested right pertaining to local zoning code changes. The clarifications of vested activities provided for in § 15.2-2307 are not vastly different from those used in the 1991 Attorney General’s opinion to Delegate John Watkins, to which I referred in my earlier letter, but they are more precise.

I did not reference that Code section in my earlier letter because I am confident that local government attorneys are already aware of it and the criteria it establishes for vesting. Our guidance was intended to address vesting as it applies to the Bay Act. Local governments

ultimately have the unilateral authority to make determinations of vested rights. My earlier guidance and this guidance is in no way an attempt to interfere with that authority.

We are advised that § 15.2-2307 should not be read to overrule the Watkins opinion. Instead, the statute should be applied consistently with § 10.1-2115, with the Watkins opinion and other opinions. In other words, while the definition of “vested rights” has been clarified through specific examples legislatively since the earlier Attorney General’s opinions were issued, the rule that localities should attempt to conform to the Bay Act and Regulations to the “maximum extent feasible” remains the same. The required conformity is now with a more detailed legislative definition of “vested rights.” However, the extent to which this can be done may vary from project to project based on how far the project has progressed and the extent of legal and financial commitments made. If the local government determines that a particular applicant has met the vesting requirements of § 15.2-2307 of the Code, we recognize the local government’s authority to allow the applicant to develop under the prior rules, and CBLAD would respect that local determination.

I hope this guidance will resolve any concerns you may have about how such projects should be treated pursuant to your Bay Act program. The above interpretation of the regulations regarding potential water-dependency will still be considered by the Board when they undertake a review of their regulations in the fall, with regard to clarifying their intent about such projects in the Regulations. If you or your staff have any further questions about this guidance letter, please don’t hesitate to contact your staff liaison, *name*, or me at 1-800-243-7229. If there are legal questions, we will be glad to refer them to our counsel at the Attorney General’s office.

Sincerely,

Digital Signature

C. Scott Crafton

CSC/tf

c: The Honorable W. Tayloe Murphy, Jr., Secretary of Natural Resources
The Honorable Members, Chesapeake Bay Local Assistance Board
Roger Chaffe, OAG
Russ Baxter, OSNR
Bob Burnley, DEQ
Local Program Contact Person
Liaison